# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15615

JOHN J. HALKO, JR., *Appellant*

v.

RAYMOND W. ANDERSON

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued April 19, 1966

Before KALODNER, HASTIE and SMITH, *Circuit Judges*

**Opinion of the Court**

(Filed May 5, 1966)

PER CURIAM:

The Superior Court of Delaware has imposed a jail sentence upon the petitioner pursuant to a conviction of operating a motor vehicle while intoxicated. The petitioner has sought habeas corpus in the District Court for the District of Delaware alleging fundamental unfairness in his trial. In a careful opinion the District Court considered each point made by the petitioner and denied the writ. We agree that no error of constitutional dimension, no denial of due process of law, has been shown.

The Order of the District Court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit.*

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

**Judgment**

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed August 6, 1965, be, and the same is hereby affirmed, with costs.

ATTEST:

IDA O. CRESKOFF
Clerk

May 5, 1966

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**Petition for Rehearing**

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT:

A Petition for Rehearing in the above mentioned matter is respectfully filed by reason of the following:

1. That on May 5, 1966, your Honorable Court entered a judgment affirming the Order of the United States District Court for the District of Delaware, denying a Writ of Habeas Corpus to your Petitioner.

2. That at the argument before your Honorable Court on April 19, 1966, many questions were asked from the Bench, which prevented the Petitioner from developing his arguments fully.

3. That your Petitioner contended that there had been an unlawful search and seizure and relied heavily on the decision of the United States District Court for the Eastern District of Pennsylvania, United States ex rel. Manduchi v. Tracey, 233 F. Supp. 423 (1964) which held that such search and seizure is illegal. The Opinion of

Judge Layton of the United States District Court for the District of Delaware is clearly opposite to that decision and your Honorable Court in its Opinion, did not rule which case is correct or incorrect concerning this very important point.

4. The Petitioner was also requested at the hearing on April 19, 1966 to cite a case in support of the denial of cross-examination reaching constitutional dimensions. Petitioner believes that United States v. Cardillo, 316 F. 2d 606 (2d Cir. 1963) is of great importance to the Petitioner's case.

WHEREFORE, for all of the reasons advanced, your Petitioner respectfully requests a rehearing on these very important matters and believes they are of sufficient importance to merit a rehearing.

JOHN J. KRAFZIG, JR.
*Attorney for Petitioner*

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**Sur Petition for Rehearing**

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

KALODNER
*Circuit Judge*

Dated: May 31, 1966

No. 15,615

JOHN J. HALKO, JR., *Appellant*

v.

RAYMOND W. ANDERSON

Pursuant to Rule 36(2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until June 30, 1966.

KALODNER
*Circuit Judge*

Dated: June 8, 1966

**Exhibit No. 57**

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

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Criminal Action Nos. 637, 639, 1960

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STATE OF DELAWARE, *Plaintiff*,

v.

JOHN J. HALKO, JR., *Defendant*.

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## AFFIDAVIT

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*State of Delaware,*
*County of New Castle, ss:*

Be it remembered, that on this 23rd day of May, A. D. 1963, personally appeared before me, the Subscriber, a Notary Public for the State and County aforesaid, Frederick Knecht, Jr., who being by me duly sworn according to law, did depose and say:

1. That he is the defense counsel in the above case.

2. That attached hereto as Exhibits A, B, C, D, E, F, G, and H are newspaper articles which appeared while the trial was pending in either the Wilmington Morning News or the Evening Journal on May 7, 8, 9, 10, and 11, 1963.

3. That he has been informed and therefore believes that there were also radio broadcasts on local radio stations containing the same information on the same dates.

4. That he believes the information contained in the aforesaid newspaper articles was prejudicial to the verdict of the jury and would influence them if they either read the articles or were informed of their contents by others, and that the same is true of the aforesaid radio broadcasts, since these articles all made mention of the fact that the defendant had previously been convicted of the charges upon which he was then being tried.

5. That the article appearing in the May 11, 1963, issue of the Evening Journal stated that the defendant was given a new trial by the Delaware Supreme Court following his earlier convictions in the Court of Common Pleas and the Superior Court on "technical grounds."

6. That the trial was not concluded until May 13, 1963.

7. That the Court did not tell the jury not to read newspaper articles or listen to radio broadcasts about the trial while it was pending.

8. That he does not believe that a general admonition by the Court not to communicate with anyone during the trial would be construed by jurors to be a prohibition against reading the newspaper or listening to the radio and that if the jurors saw an article in the newspaper or heard a broadcast on the radio their natural curiosity, absent an express admonition, would be to read the article or listen to the broadcast.

9. That he believes it was error for the Court not to give an express admonition to the jury not to read newspaper articles or listen to radio broadcasts about the trial while it was pending, *sua sponte*.

FREDERICK KNECHT, JR.

Sworn to and subscribed before me the day and year aforesaid.

(Signature illegible),
*Notary Public.*

## EXHIBIT A

Morning News, Wilmington, Del., Tues., May 7, 1963 21

### 2D DRIVING TRIAL OPENS FOR HALKO

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Wilmington businessman John J. Halko Jr. yesterday went on trial for a second time on charges of driving under the influence of liquor and driving with a revoked license.

Yesterday's Superior Court hearing, before a jury of six men and six women, climaxed more than 18 months of briefs, arguments and appeals.

A jury found Halko guilty in October, 1961, of driving under the influence of liquor early on the morning of Oct. 18, 1959.

Shortly After, the State Supreme Court ordered a rehearing, saying trial Judge Stewart Lynch, had erred in charging the jury that Halko had the burden of proving an alibi that he wasn't driving when arrested.

Jndge Lynch, who is hearing the second trial, last December denied motions to suppress evidence gained by police who arrested Halko. Police said they found Halko slumped over the wheel of his car outside the H&S Manufacturing Co. a plant he owns.

Yesterday the state's principal witness, William D. Forestieri, 16 Winston Ave., Elmhurst, spent nearly three hours on the stand.

Forestieri claimed he saw Halko driving erratically on Boxwood Road and Maryland Avenue, Halko's car struck his car from the rear, and continued without stopping.

Forestieri Said he followed Halko down Middleboro Road to Valley Road, where the businessman turned off. The witness said he then went to call police.

Forestieri claimed he had two good looks at Halko, once when Halko pulled to the side of the road in front of the Conrad School, and again at the Boxwood-Maryland intersection, after the collision.

Halko's attorney, Frederick Knecht, Jr., tried for over two hours in the afternoon to shake Forestieri's testimony, and his questions resulted in several sharp exchanges with Judge Lynch.

Knecht referred often to the transcript of the first Superior Court trial, at which Forestieri testified, to check his responses.

Forestieri is scheduled to resume the stand today for further questioning by Deputy Atty. Gen. W. Laird Stabler Jr., prosecuting the case.

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EXHIBIT B

32 Evening Journal, Wilmington, Del. Tuesday, May 7, 1963

'59 DRIVING CASE BEING RETRIED

A Richardson Park businessman is getting his second Superior Court trial on charges of driving under the influence of liquor and operating on a revoked license.

The retrial of John J. Halko Jr., president of H. & S. Manufacturing Co. of 15 Brookside Drive, began yesterday before a jury of six men and six women. It follows more than 18 months of briefs and arguments.

Halko was arrested early on the morning of Oct. 18, 1959, after state police claimed they found him slumped over the wheel of his car outside his office. He was found guilty in a jury trial two years later and appealed.

The State Supreme Court ordered a new trial, holding that President Judge Charles L. Terry, Jr., who is now on the Supreme Court, had erred in charging the jury

that Halko had the burden of proving an alibi that he wasn't driving when arrested.

Judge Stewart Lynch, who is presiding at the second trial, denied motions last December to suppress evidence found by police when they made the arrest.

The state's principal witness, William D. Forestieri of Elmhurst, resumed testimony today. He was questioned at length yesterday by Frederick Knecht, Jr., defense attorney, and Deputy Atty. Gen. W. Laird Stabler Jr., the prosecutor.

Forestieri claims his car was struck from the rear at Maryland Avenue and Boxwood Road and that Halko drove off without stopping. Forestieri contends he pursued Halko, but lost sight of him at Middleboro and Valley Roads.

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EXHIBIT C

Wilmington Morning News Wednesday, May 8, 1963

STATE DUE TO COMPLETE HALKO CASE

The state is expected to complete its case today against a Richardson Park businessman on trial a second time in Superior Court on charges of driving under the influence of liquor.

The defendant, John J. Halko Jr., president of the H & S Manufacturing Co., 15 Brookside Drive, also is charged with driving on a revoked license.

Deputy Atty. Gen. W. Laird Stabler Jr. said his case will wind up with completion of testimony by Franklin Klair, a state trooper who arrested Halko early on the morning of Oct. 18, 1959.

Halko's attorney, Frederick Knecht Jr., is expected to take at least the rest of the week to present his defense to the jury of six men and six women.

Yesterday, Klair and State Police Cpl. Coleman Stoops testified to arresting Halko after finding him slumped over the wheel of his car outside his plant.

They told of identifying Halkos' car by the license number furnished earlier by the state's principal witness, William D. Forestieri, who claimed Halko struck his car and drove off without stopping.

Judge Stewart Lynch is hearing the case, ordered retried by the State Supreme Court which held that the first trial judge had erred in his charge to the jury.

At that trial, Judge Charles L. Terry, Jr., now of the State Supreme Court, had charged that Halko had the burden of proving an alibi that he wasn't driving when arrested.

(It was erroneously reported yesterday in the Morning News that Judge Lynch had presided at the first trial.)

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EXHIBIT D

30 Evening Journal, Wilmington, Del.
Wednesday, May 8, 1963

HALKO DENIES DRIVING CAR AT TIME OF CRASH

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The defense began its case today in John J. Halko Jr.'s second Superior Court trial on a charge of driving under the influence of liquor.

Frederick Knecht Jr., attorney for the Richardson Park businessman, told the jury of six men and women

that he will produce witnesses to show Halko was not driving his car but was in his shop at 15 Brookside Drive on the night of Oct. 17-18, 1959.

Knecht said testimony will come from people who talked to Halko at his shop or conversed with him over the telephone.

State witness have testified Halko drove away from an accident at Boxwood Road and Maryland Avenue and was found slumped over the steering wheel of his car outside the H. & S. Manufacturing Co. of which he is president.

Halko was found guilty in his first trial but obtained another after the State Supreme Court ordered a reversal of verdict on technical grounds. Judge Stewart Lynch is presiding at this trial.

Deputy Attorney General W. Laird Stabler, Jr. rested the state's case this morning.

The last state witness, State Trooper Franklin Klair, had a busy time. He testified briefly for the defense after his cross-examination as a state witness was concluded. Then he was excused to go to another courtroom to testify in a civil case.

As a defense witness, Klair testified he did not observe that Halko was handcuffed when the defendant was put in a police car after being removed from his own vehicle.

EXHIBIT E

Morning News, Wilmington, Del. Thurs., May 9, 1963 19

## HALKO TRIAL 'SURPRISE' PROMISED

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Attorneys for John J. Halko, Jr., Richardson Park businessman on trial on drunken driving charges, say they plan to put three "surprise" witnesses for Halko on the stand today.

Frederick Knecht Jr. yesterday said he expects three persons who have not testified in Halko's two previous trials to take the stand today.

Knecht said he expects to complete his defense either this afternoon or tomorrow morning.

HALKO PRESIDENT of H & S Manufacturing Co., 15 Brookside Drive, is also accused of driving on a revoked license. He was arrested early on the morning of Oct. 18, 1959.

Convicted in a trial in New Castle County Court of Common Pleas, he appealed to Superior Court, where a jury found him guilty.

However, the State Supreme Court ruled, on appeal, that the trial judge had erred in telling the jury that Halko had to prove an alibi that he hadn't been driving the car.

THE STATE'S principal witness, William D. Forestieri, has said that Halko struck his car at the intersection of Boxwood Road and Maryland Avenue, and drove off without stopping.

Yesterday, Knecht put five witnesses on the stand to refute the state's case, being prosecuted by Deputy Atty. Gen. W. Laird Stabler Jr.

Wilmer (Rudy) Williams, owner of a service station at Boxwood Road and Maryland Avenue testified the lights on his station were turned off at the time Forestieri claimed he obtained a good look at Halko.

Forestieri also had testified to getting Halko's license number and going to a cab stand from where it was telephoned to Wilmington and county police.

However, police officials testified that no license number was noted on radio logs for the morning in question.

Witnesses for both police said procedure calls for radio operators to note down license numbers broadcast over the air, but this is not always done.

Two witnesses, one an H & S salesman, also placed Halko's car in front of the plant and unoccupied at the hour the accident is supposed to have occurred. One said he talked to Halko at the time.

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EXHIBIT F

20 Morning News, Wilmington, Del. Fri., May 10, 1963

BRUTALITY BY POLICE IS HALKO CLAIM

Police brutality was charged yesterday by John J. Halko Jr. in Superior Court testimony in his trial a second time on charges of driving while under the influence of liquor.

Halko, President of H & S Manufacturing Co., Richardson Park, testified yesterday, on the fourth day of the trial before Judge Stewart Lynch. Halko was the last of 18 defense witnesses. The case is expected to go to the jury today.

He told the court he was hospitalized after his arrest and hospital records showed he reported he had been

"mussed up." Dr. R. C. Corbalis, a surgeon who was serving as a resident physician at The Memorial Hospital when Halko was treated, reported the patient had multiple abrasions and contusions on his arms, neck, chest and back.

Presumably the state will answer this testimony today, when five rebuttal witnesses will be presented by Deputy Atty. Gen. W. Laird Stabler Jr.

Frederick Knecht Jr., Halko's attorney, said he may bring on sur-rebuttal witnesses.

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EXHIBIT G

Wilmington Morning News Saturday, May 11, 1963

TRIAL TOLD HALKO HURT IN CELL FIGHT

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A state witness testified yesterday that John J. Halko Jr. seemed unhurt when put into a cell after being arrested Oct. 18, 1959, on charges of driving under the influence of liquor.

Nearly five days of testimony by more than 20 witnesses ended in Superior Court, and the case is expected to go to the jury Monday.

Halko, President of the H & S Manufacturing Co., 15 Brookside Drive, Richardson Park, is on trial a second time on the driving charges.

A previous conviction was set aside after the State Supreme Court ruled the first trial judge had erred in his instructions to the jury. Judge Stewart Lynch is presiding at this hearing.

Paris Steeves, Elkton, Md., said Halko was put into a cell with him early in the morning of his arrest, and

appeared unhurt. Steeves added that Halko later got into a fight with a man in the next cell.

Steeves said he, like Halko had been arrested on drunken driving charges, but that his arrest was several hours earlier than the defendant's.

Halko has charged state police with beating him up while driving from where he was arrested to state police headquarters at Troop 2.

The arresting officers, Cpl. Coleman Stoops and Franklin Klair, resumed the stand to deny beating Halko. The state's main witness, William D. Forestieri said he followed the police car to the station and he saw no beating.

Deputy Atty. Gen. W. Laird Stabler Jr., prosecuting for the state, and Frederick Knecht, Jr., Halko's attorney, are expected to make their summations Monday morning.

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EXHIBIT H

Evening Journal, Wilmington, Del. Saturday, May 11 1963

HALKO TRIAL RECESSED BY LYNCH

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John J. Halko Jr.'s trial on tipsy driving charges was recessed yesterday until 9 a.m. Monday.

Superior Court Judge Stewart Lynch, who is hearing the case with a jury of six men and six women, declared the recess after the state presented testimony in rebuttal of the defense, which closed its case Thursday afternoon.

Cross-examined yesterday by the prosecutor, Deputy Atty. Gen. W. Laird Stabler Jr., Halko denied the state's charges and claimed he had been in his office, the H & S Manufacturing Co. at 15 Broadside Drive, Richardson Park, on the night of Oct. 17-18, 1959.

The state claims Halko drove under the influence of liquor and on a revoked license. Witnesses testified he was found slumped over the wheel of his car outside his plant after a collision with another automobile at Maryland Avenue and Boxwood Road.

Halko was found guilty in previous trials in Common Pleas and Superior Courts. On appeal to the state Supreme Court, however, he obtained a new trial on technical grounds.

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**Exhibit No. 75**

May 20, 1963

MEMORANDUM

To: President Judge Duffy and all Judges of Superior Court.

From: Stewart Lynch.

Mr. Knecht, in his Motion for a New Trial, filed in behalf of John Halko, Jr., has asserted error on my part in that I did not admonish the Jury at any stage in the case that its members were not to read any news article appearing in the papers (and while his motion did not include news accounts over the radio, it would seem to me these would be included) that referred to the Halko case.

I spent a great part of last Saturday morning examining the law on the subject. Generally it may be found in 23A *C.J.S.*, §§ 1361-1364b. Your attention is called to the cited material, and particularly the case of State v. Cole, 114 A. 201 (Del. Gen. Sess.), which case held the fact that a news article had been prejudicial to the accused was not

ground for a new trial, no motion having been made while trial was in progress that the Court do anything specific.

The Court did, page 203, *sua sponte,* after the Court's attention had been brought to the article, advise the Jury it should disregard the news article, and, page 204, counsel for accused did no more. Later he noted the publication of the article as a ground for new trial, but the ground was not upheld. I can't recall, except for a time after the Cole case was tried in the early 1920's any Court in Delaware admonishing a Jury in a criminal case—other than capital offenses—at any point not to read news articles. In the trial of the Halko case, at no point did Mr. Knecht bring to the Court's attention anything on this subject. Candidly, it would seem to me doing this would more likely be a cause for a Jury's curiosity to be aroused, than if the matter was left silent.

In a number of cases of late, however, the Courts have said it was the *duty* of the Court to admonish the Jury on this point—I suppose as they are empaneled and as they are permitted to separate, that they should not read news articles about the case and I would think this would include radio news casts.

There is some elaborate discussion of the subject in U.S. v. Smith, 200 F. Supp. 885, Rev. 306 F. 2d 596; 116 S.E. 2d 580, and in 116 S.E. 2d 580, 584, although this case may be explained on a Georgia Statute or law.

Mr. Knecht contends there was such a news article which referred to a previous conviction for "drunken driving" and this "prejudiced his rights". This was considered reversible error in 79 S. Ct. 1171 (but I think it is limited to the Supreme Court's power of "supervision" of federal cases and not on a constitutional basis) even though there had been a charge to the Jury that they should only consider the evidence heard from the witness stand. I always give this charge and gave it in Halko.

You are all familiar with the Supreme Court's language in Draper, 1 Storey 390, 395, as to the effect to be given to a charge that covers point of alleged error.

In the Smith case, ante, the District Court talks about improper publicity being an invasion of a defendant's constitutional right to a fair trial, if it includes reference to a prior conviction.

In time I will consider and determine Mr. Knecht's motion. I did not see the news articles, and I have directed Mr. Knecht to make all news stories about the case, while in course of trial, be made part of the record.

Some cases say it is for the Court to determine if prejudice arose because of the news articles; others say the defendant must show he was prejudiced by the stories; while others talk of a rebuttable presumption of prejudice by such publicity, and one case says the Court does not have to do it, *sua sponte*.

This opens the question of whether the Court should reassemble the Jury during the remainder of the present term—I propose to do so on Wednesday—and make inquiry (1) did they see the news stories and (2) were they influenced in any wise in reaching their verdict because they had read the story regarding the past conviction?

I invite your prompt comments and suggestions as to this last course of action; see comment by Court of Appeals in 225 F. 2d 220, 228, 229, where Trial Court read offensive news article to Jury. Certainly, had Mr. Knecht raised the question at any time throughout the trial, I consider I could have made inquiry and determined if any Juryman had read the article. If I could have asked it then, why not now?

I realize I can't and would not inquire if the subject was injected into Jury Room discussions. My inquiries

would concern what only may have happened before the case was submitted.

It would be tragic to have to spend another 5/6 days retrying the case—if through interrogation of the Jury it could be first learned if they had seen any offensive article and/or if any of them had been influenced thereby.

It would be preliminary to considering if my charge may have cured whatever prejudice could have resulted.

I suggest the law clerks that we have check the Law Review material that may be available so I could consider the question by June 6th and then made a report at our next conference and recommend to you Judges as to how far we must go—in preserving an accused's constitutional rights of a fair trial—in the matter of admonition (a) as to a Jury being empaneled; (2) as they are permitted to separate at noon recesses and at close of day; and (3) by way of instruction before the case is submitted.

We might consider a reference to this in the Petit Juror's handbook.

SL/pp

cc: Attorney General
Frederick Knecht, Jr., Esq.